84-1038

DEC 28 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1984

NO.

MARIO DE MODENA, dba SIXTH AVENUE PHARMACY, *et. al.*,
Petitioners

-V.-

KAISER FOUNDATION HEALTH PLAN, INC., *et. al.*, *Respondents.*

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.
Petitioner,

-V.-

KAISER FOUNDATION HEALTH PLAN, INC., *et. al.*, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR ALABAMA PHARMACEUTICAL ASSOCIATION FLORIDA PHARMACY ASSOCIATION GEORGIA PHARMACEUTICAL ASSOCIATION KENTUCKY PHARMACISTS ASSOCIATION LOUISIANA PHARMACISTS ASSOCIATION MARYLAND PHARMACEUTICAL ASSOCIATION MISSISSIPPI STATE PHARMACEUTICAL ASSOCIATION AND VIRGINIA PHARMACEUTICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JAMES ALLEN MAIN
MAIN, SMITH AND RICE
SUITE 301, AMSOUTH BANK BUILDING
ANNISTON, ALABAMA 36201
(205) 237-8080
Attorneys for *Amicus Curiae*

In the Supreme Court

of the United States

OCTOBER TERM, 1984

NO.

MARIO DE MODENA, dba SIXTH AVENUE PHARMACY, *et. al.*,

Petitioners

-V.-

KAISER FOUNDATION HEALTH PLAN, INC., *et. al.*,

Respondents.

PORTLAND RETAIL DRUGGIST ASSOCIATION, INC.

Petitioner,

-V.-

KAISER FOUNDATION HEALTH PLAN, INC., *et. al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

MOTION OF THE ALABAMA PHARMACEUTICAL ASSOCIATION FLORIDA PHARMACY ASSOCIATION, GEORGIA PHARMACEUTICAL ASSOCIATION, KENTUCKY PHARMACISTS ASSOCIATION, LOUISIANA PHARMACISTS ASSOCIATION, MARYLAND PHARMACEUTICAL ASSOCIATION, MISSISSIPPI STATE PHARMACEUTICAL ASSOCIATION, AND VIRGINIA PHARMACEUTICAL ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The brief urges the Court to issue a writ of certiorari to review the opinion of the decision of the Court of Appeals for the Ninth Circuit in the above entitled case.

Counsel for the Petitioners has consented to the filing of the attached brief. Counsel for the Respondents have not consented to its filing.

The Interest of the Pharmaceutical Associations of Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, and Virginia

The Pharmaceutical Associations of Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, and Virginia (referred to hereafter as "the associations") are the professional organizations representing the individual pharmacists in these respective eight states. The general purposes of these eight professional pharmaceutical associations are to promote the public welfare through the profession of pharmacy and to represent the interest of the individual pharmacists within these eight states.

It is in the furtherance of the above-stated purposes that these eight state pharmaceutical associations wish to express to this Court their views as to the significance of the decision of the Court of Appeals for the Ninth Circuit in this matter and to urge the issue of a writ of certiorari to review the opinion.

The decision of the Court of Appeals has massive precedential consequences to retail pharmacy in all eight of the above-mentioned states. The decision of the Court of Appeals threatens the existence of community retail pharmacy in all eight states.

The associations contend that the holding of the Court of Appeals in this case is not consistent with the legislative intent of the Nonprofit Institutions

Act and the Robinson-Patman Act. The construction of the Nonprofit Institutions Act exemption in the Ninth Circuit Court of Appeals' opinion would result in a circumvention of the purpose of both this statute and the Robinson-Patman Act, thus creating potential for a monopolistic climate which could destroy community retail pharmacy.

The Nonprofit Institutions Act was enacted to confer benefits upon nonprofit institutions in limited areas where the nonprofit institution operates on a different functional level than private enterprise.

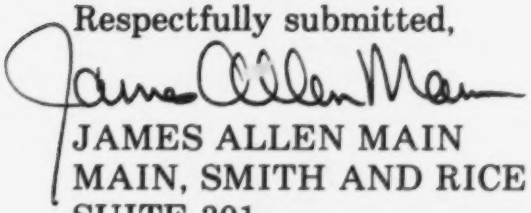
The ultimate result of a decision allowing Health Maintenance Organizations to compete on the same functional level as retail pharmacy without the restrictions of the Robinson-Patman Act of 1936 would destroy the retail pharmacy segment of local business. It would destroy retail pharmacy because it would allow and encourage Health Maintenance Organizations to resell pharmaceuticals to the general public in competition with retail pharmacy at a price below the acquisition cost of retail pharmacies. The simple economics of such a business climate would result in the closing of retail pharmacies and the monopolizing of pharmacy by Health Maintenance Organizations. Such a result would adversely affect the delivery of health care services at the community level.

In view of the tremendous impact on pharmacy in these eight states that the Ninth Circuit Court of Appeals decision would have, surely it is appropriate that the pharmacists of these eight states be given the opportunity to convey to the Court their view of the application of this exemption to the Robinson-Patman Act as it affects their profession.

Accordingly, the Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, and Virginia

Pharmaceutical Associations respectfully urge this Court to grant their motion for leave to file this brief as *amicus curiae.*

Respectfully submitted,



JAMES ALLEN MAIN
MAIN, SMITH AND RICE
SUITE 301
AMSOUTH BANK BUILDING
ANNISTON, ALABAMA 36201
(205) 237-8080
Attorneys for Amicus Curiae

December 31, 1984

TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 2
Question Presented 2
Statutes Involved 2
Statement of the Case 3
1. Proceedings in the Lower Courts 3
2. Court of Appeals Decision 4
Summary of Argument 5
ARGUMENT 7
Introduction 7
I. THE NINTH CIRCUIT COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS STATING THE ACKNOWLEDGED FOCUS AND INTENT OF THE ROBINSON-PATMAN ACT OF 1936 9
II. THE NINTH CIRCUIT COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN APPLICATION OF THE NONPROFIT INSTITUTIONS ACT OF 1938 11
CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Abbott Labs v. Portland Retail Druggist Assn. 425 U.S. 1 (1976) 5, 10

De Modena v. Kaiser Foundation Health Plan, Inc., 743 F. 2d 1388 (9th Circuit 1984) 4

Federal Trade Commission v. Anheuser Busch, Inc., 363 U.S. 536 (1960) 5, 7, 9

Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948) 9

Federal Trade Commission v. Sun Oil Company, 371 U.S. 505 (1963) 5, 7, 9, 10

Jefferson County Pharmaceutical Assn. Inc. v. Abbott Laboratories, et. al., 460 U.S. 150 (1983) 12

Moore v. Mead's Fine Bread Company, a Corp., 348 U.S. 115 (1954) 13

Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951) 9

United States v. Scharton, 285 U.S. 518 (1932) 12

Statutes:

Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (a) 2, 7

The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c 3, 8, 11

Health Maintenance Organization Act, 42 U.S.C. § 300e, *et. seq.* (1973) 8

Legislative Materials:

House Report 2161, 75th Cong., 3d Sess., April 19, 1938 12

1973 U.S. Code Cong. and Adm. News, p. 3039 . . . . . 6, 11

In the Supreme Court

of the United States

OCTOBER TERM, 1984

NO.

MARIO DE MODENA, dba SIXTH AVENUE PHARMACY, *et al.*,
Petitioners,

-V.-

KAISER FOUNDATION HEALTH PLAN, INC. *et. al.,* *Respondents.*

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC. *Petitioner,*

-V.-

KAISER FOUNDATION HEALTH PLAN, INC. *et. al.,* *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

BRIEF FOR THE
ALABAMA PHARMACEUTICAL ASSOCIATION,
GEORGIA PHARMACEUTICAL ASSOCIATION,
KENTUCKY PHARMACISTS ASSOCIATION,
LOUISIANA PHARMACISTS ASSOCIATION,
MARYLAND PHARMACEUTICAL ASSOCIATION,
MISSISSIPPI STATE PHARMACEUTICAL ASSOCIATION,
AND
VIRGINIA PHARMACEUTICAL ASSOCIATION,
AS *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR
WRIT OF CERTIORARI

Interest of *Amicus Curiae*

The interest of Alabama Pharmaceutical Association, Florida Pharmacy Association, Georgia Pharmaceutical Association, Kentucky Pharmacists Association, Louisiana Pharmacists Association, Maryland Pharmaceutical Association, Mississippi State Pharmaceutical Association, and Virginia Pharmaceutical Association as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

Question Presented

Is the Nonprofit Institutions Act exemption to the Robinson-Patman Act of 1936 applicable to the purchase of pharmaceuticals by a Health Maintenance Organization (HMO) for resale in competition with retail pharmacies?

Statutes Involved

1. Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (a):

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competi-

tion with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

2. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c:

"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Statement Of The Case

1. Proceedings in the Lower Courts

Petitioners filed these antitrust actions charging Respondents with violations of three distinct antitrust provisions: (1) Section 2(f) of the Robinson-Patman Anti-Price Discrimination Act, 15 U.S.C. § 13 *et. seq.* (1970), by knowingly inducing or receiving discriminatory low prices from pharmaceutical suppliers; (2) Section 2 of the Sherman Act. 15 U.S.C. § 2, by attempting to monopolize the retail drug market; and (3) Section 1 of the Sherman Act, by unlawfully tying health products and services for sale. The Petitioners actions were consolidated for trial.

Respondents filed a motion for summary judgment on the Petitioners claims and on February 17, 1983 the district court granted the motion on all three claims.

The Court of Appeals for the Ninth Circuit affirmed the district court with respect to the claim of attempted monopolization, the tie-in claim and the conclusion that drug purchases made by Respondents for resale to its members are exempt from the Robinson-Patman Act under the exception created by the Nonprofit In-

situtions Act 15 U.S.C. § 13c (1970). The Court of Appeals reversed the district court's determination that Respondents' sales of drugs to non-members constituted a de minimus violation of the Robinson-Patman Act (743 F 2d 1388). Petitioners filed Motions for Reconsideration, and to Alter or Amend Judgment which were denied March 3, 1983 and March 16, 1983.

2. Court of Appeals Decision

The Court of Appeals concluded that a non-profit Health Maintenance Organization is a charitable institution and that ALL drug purchases made by the HMO for resale to its members or subscribers is qualified for protection under the Nonprofit Institutions Act. In holding that a HMO is qualified for protection under the Nonprofit Institution Act the Ninth Circuit reasoned that a liberal interpretation of the term "charitable institution" in the Nonprofit Institutions Act is applicable to HMO's and after analysis of the function of the HMO summarized its view as:

> "Given this extraordinarily broad INSTITUTIONAL FUNCTION, any sale of drugs by an HMO to one of its members falls within the basic function of the HMO. Consequently, we must conclude that drugs purchased by an HMO, such as Kaiser-Permanente, for resale to its members are purchased for the HMO's 'own use' within the meaning of the Nonprofit Institutions Act and thus qualify for protection under the Act."[1] (emphasis added)

---

1. *De Modena v. Kaiser Foundation Health Plan, Inc.*, 743 F. 2d 1388 (9th Circuit 1984)

Summary of Argument

In 1936 Congress enacted the Robinson-Patman Act to protect small business against discriminatory price practices of large interstate businesses.[2] Two years later the Nonprofit Institutions Act of 1938 was enacted as an exemption from the Robinson-Patman Act for certain nonprofit institutions in the purchase of supplies for their own use.

The issue in this case is whether or not Health Maintenance Organizations (HMOs) may invoke the Nonprofit Institutions Act exemption to purchase pharmaceuticals "for resale" to subscribers to the HMO's Supplemental Health Care Plan without violating the legislative mandate of the Robinson-Patman Act.

The Robinson-Patman Act of 1936 was enacted to assure that businesses operating on a competitive functional level would be on an equal basis as far as price is concerned.[3] Congress intended to eliminate price discrimination practices threatening small independent merchants.

The Nonprofit Institutions Act of 1938 was enacted to allow certain nonprofit institutions to acquire their supplies as inexpensively as possible. This exemption was intended for the purchase of "supplies" for the institutions' own use, not the purchase of commodities for resale.

In 1976, this Court, in a factually similar case, *Abbott Labs vs. Portland Retail Druggist Association,*[4] recognized that "the focus of Robinson-Patman is

---

2. *Federal Trade Commission v. Anheuser-Busch, Inc.,* 363 U.S. 536 (1960)
3. *Federal Trade Commission v. Sun Oil Company,* 371 U.S. 505 (1963)
4. 425 U.S. 1,13 (1976)

competition at the same functional level". In applying the Nonprofit Institutions Act exemption to HMO's, without regard to functional levels of competition, the Ninth Circuit Court of Appeals has given HMO's a "blank check" in the resale of pharmaceuticals acquired with the advantage of discriminatory prices. The decision is in direct conflict with the acknowledged focus and intent of Robinson-Patman.

HMO's are legal entities designed by Congress in 1973 to increase the options from the point of view of the consumer. The legislative purpose was not to "remake" the health care delivery system but to improve the opportunities of the general public to obtain quality health care.[5]

The Ninth Circuits' holding would "remake" the health care delivery system by allowing the advantage of discriminatory prices by HMO's to destroy private enterprise, i.e., competing commercial pharmacies.

HMO's engaging in the sale of pharmaceuticals to ambulatory patients as subscribers to their Supplemental Health Care Plan are on the same functional level as retail pharmacy. When any entity chooses to operate on the same functional level as retail pharmacies, they are not entitled to purchase these "supplies" for resale under the Nonprofit Institutions Act exemption to the Robinson-Patman Act.

The Ninth Circuit has ignored the functional level test implicit in the categorical rules established in *Abbott Labs.* In its attempt to analogize the HMO as a Nonprofit Institutions Act entity the Ninth Circuit has created definitions of the terms "charitable" and

---

5. 1973 U.S. Code Cong. and Adm. News, p. 3039

"own use" that circumvent the purpose of the Nonprofit Institutions Act.

The importance and substantiality of the question presented has massive precedential consequences to retail pharmacy.

For these reasons, a writ of certiorari should issue to review the opinion of the Ninth Circuit.

ARGUMENT

Introduction

The Robinson-Patman Antidiscrimination Act was enacted by Congress in 1936 to protect small businesses against favoritism shown by suppliers to large buyers.[6] It provides in part that:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition. . . ."[7]

Two years later, in 1938, the Nonprofit Institutions Act was enacted as an exemption from the prohibitions of the Robinson-Patman Act for nonprofit institutions in the purchase of supplies for their own use. The Nonprofit Institutions Act provides:

> "Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for

---

6. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963)

7. Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a)

> their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."[8]

The instant question *Amicus Curiae* seeks this Court to address is whether or not the Nonprofit Institutions Act can be used to circumvent the purpose of the Robinson-Patman Act by allowing Health Maintenance Organizations to invoke this exemption to purchase pharmaceuticals "for resale" to the subscribers to their Supplemental Health Services Plan. This particular circumvention of the purpose of the Robinson-Patman Act would threaten the survival of smaller local merchants (retail pharmacy), the protection of which is the very purpose of the Robinson-Patman Act.

Congress established Health Maintenance Organizations in 1973 as legal entities that may enter into contractural relationships with "members" as "subscribers" for health services.[9]

An HMO is required to provide basic health services and is allowed to contract with subscribers for supplemental health services (including pharmaceuticals). The individual subscriber has the option to contract or not to contract for the supplemental health services, based on comparison in the market place.

The Ninth Circuit's holding would exempt HMO's from the Robinson-Patman Act and therefore from the competitive force of the market place.

The focus and rationale of the Robinson-Patman Act demands preservation of community pharmacies and community pharmacy as a competitive force in

---

8. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c.
9. Health Maintenance Organization Act, 42 U.S.C. §§ 300e, *et. seq.* (1973)

the market place. The Court of Appeals decision would destroy commercial pharmacies as a competitive force in the market place.

I.

THE NINTH CIRCUIT COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THIS COURTS DECISIONS STATING THE ACKNOWLEDGED FOCUS AND INTENT OF THE ROBINSON-PATMAN ACT OF 1936.

The Robinson-Patman Act was enacted to assure that businesses at the same functional level would start on an equal competitive footing as far as price is concerned.[10]

The Robinson-Patman Act was enacted as a protection for small businesses which are unable to buy in quantities against competing operations of large interstate concerns.[11] Price favoritism shown by suppliers to large buyers caused congressional concern for the survival of small local merchants, and the 1936 Robinson-Patman amendments to the Clayton Act were passed to strengthen the Clayton Act prohibitions on price discrimination.[12] Thus the fundamental purpose of the Robinson-Patman Act is to protect the small independent businessman.

This Court's opinion explaining the basic purposes of the Robinson-Patman Act in *Federal Trade Com-*

---

10. *Federal Trade Commission v. Sun Oil Company,* 371 U.S. 505 (1963).

11. *Federal Trade Commission v. Morton Salt Co.,* 334 U.S. 37 (1948); *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231 (1951).

12. *Federal Trade Commission v. Anheuser Busch, Inc.,* 363 U. S. 536 (1960); *Federal Trade Commission v. Sun Oil Company,* 371 U.S. 505 (1963).

mission v. Sun Oil[13] expounds the position of retail pharmacy in this case. The Court stated that the basic purpose of the Act was to insure that purchasers from a single supplier would not be injured by that supplier's discriminatory practices. The Court noted that "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen presumably from whatever source."[14] It is irrefutable that retail pharmacies are members of that class of independent merchants and businessmen which the Robinson-Patman Act protects.

The question then must focus on the level of protection Congress intended for independent merchants and businessmen. *Federal Trade Commission v. Sun Oil Co.*, answers this query in the following language:

> "In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the SAME FUNCTIONAL LEVEL would start on equal competitive footing so far as price is concerned."[15] (emphasis added)

This Court in *Abbott Labs v. Portland Retail Druggist Association*[16] rejected the appliciation of the Non-profit Institutions Act exemption to the Robinson-Patman Act for non-profit hospitals engaged in the "resale" of pharmaceuticals at the same functional level as commercial pharmacies. The categorical rules established in *Abbott Labs* clearly apply the com-

---

13. 371 U.S. 505 (1963).
14. IBID., 520
15. IBID.
16. 425 U.S. 1 (1976).

petitive functional level focus of the Robinson-Patman Act.

In applying the Nonprofit Institutions Act exemption to HMO's, without regard to functional levels of competition, the Ninth Circuit Court of Appeals has given HMO's a "blank check" in the resale of pharmaceuticals acquired with the advantage of discriminatory prices. The Appeals Court decision is in direct conflict with the acknowledged focus and intent of the Robinson-Patman Act and decisions of this Court such as *Abbott Labs* and *Sun Oil Co.*

HMO's are legal entities designed by Congress to increase the options from the point of view of the consumer. The legislative history clearly shows that Congress did not intend to "remake" the health care delivery system but rather to increase the market place options available to the general public in obtaining quality health care.[17]

Unquestionably, the Robinson-Patman Act should be applicable to HMO's in the purchase of pharmaceuticals for resale to the subscribers to their supplemental health care plan.

II.

THE NINTH CIRCUIT COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THIS COURTS DECISIONS IN THE APPLICATION OF THE NONPROFIT INSTITUTIONS ACT OF 1938.

The Nonprofit Institutions Act was enacted to allow inexpensive acquisition of supplies by nonprofit institutions for their own use-not for resale.

An examination of the statutory language used in the Nonprofit Institutions Act [18] readily reveals the

17. 1973 U.S. Code Cong. and Adm. News p. 3039

18. The Nonprofit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c.

restrictive phraseology employed by Congress to limit this exemption from the Robinson-Patman Act. It can be fairly inferred that Congress did not intend to modify or change the purpose of the Robinson-Patman Act by the Nonprofit Institutions Act from the House Judiciary Committee's comment that "(t)he Committee does not feel that the wholesome purpose of the Robinson-Patman Act will be interferred with by the enactment of this bill. . . ."[19]

In its attempt to analogize the HMO as a Nonprofit Institutions Act entity the Ninth Circuit has created liberal definitions of the terms "charitable institution" and "own use" that circumvent the purpose of the Nonprofit Institutions Act.

On the other hand the Court of Appeals decision attempts to strictly apply the categorical rules established in *Abbott Labs* to an entity (HMO) whose structure and function are vastly different from a hospital. Furthermore, the Ninth Circuit has ignored the functional level test implicit in the categorical rules established in *Abbott Labs.*

The Ninth Circuit's holding would "remake" the health care delivery system by allowing the advantage of discriminatory purchase price to HMO's to destroy competing private enterprise pharmacies.

It has consistently been adhered to by this Court that exceptions contained in statutes, such as the Robinson-Patman Act, are to be construed strictly.[20] The Ninth Circuit's construction of the Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e, *impliedly* repealed the antitrust laws as to

---

19. House Report 2161, 7th Cong., 3d Sess., April 1938.
20. *United States v. Scharton,* 285 U.S. 518 (1932); *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, et. al.,* 460 U.S. 150 (1983).

health maintenance organizations and their affiliates. In *Moore v. Mead's Fine Bread Company, a Corp.*, Justice Douglas stated:

> "It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business. . . ."[21]

The Court of Appeals decision not only allows HMOs to destroy commercial pharmacies but in fact encourages the destruction of these local businesses.

In summary, HMO's engaging in the sale of pharmaceuticals to ambulatory patients as subscribers to their Supplemental Health Care Plan are on the same functional level as retail pharmacy. The amicus position is that when any entity chooses to operate on the same functional level as private commercial enterprise, they are *not* entitled to purchase the commodity for resale under the Nonprofit Institutions Act exemption to the Robinson-Patman Act. The Ninth Circuit opinion is in conflict with the Robinson-Patman Act, the Nonprofit Institutions Act and decisions of this Court.

The importance and substantiality of the question presented has massive precedential consequences to retail pharmacy, commercial enterprises and the health care delivery system.

For these reasons, a writ of certiorari should be issued to review the opinion of the Ninth Circuit.

---

21. 348 U.S. 115, 121 (1954).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges that this Court grant Petitioners writ of certiorari to the Court of Appeals.

Respectfully submitted,

JAMES ALLEN MAIN
MAIN, SMITH AND RICE
SUITE 301
AMSOUTH BANK BUILDING
ANNISTON, ALABAMA 36201
(205) 237-8080
Attorneys for *Amicus Curiae*

December 31, 1984